CRIMINAL REFERENCE.

Before Mr. Justice Heaton and Mr. Justice Pratt.

EMPEROR *v.* LALLU WAGHJI.*

1918.
November 12.

Indian Penal Code (Act XLV of 1860), section 379—Theft—Bombay Land Revenue Code (Bombay Act V of 1879), section 154†—Attachment of buffaloes for non-payment of land revenue—No actual seizure of buffaloes—Removal of buffaloes by their owners—Offence.

On default in the payment of land revenue by accused Nos. 2 and 3, the Mamlatdar went to their houses made a *panchnama*, declared that their buffaloes were attached, and forbade the accused to remove them. Notwithstanding this, accused Nos. 2 and 3 removed the buffaloes at the instigation of accused No. 1. For this act, accused Nos. 2 and 3 were convicted of the offence of theft and accused No. 1 of abetment of the same. The Sessions Judge was of opinion that inasmuch as the Mamlatdar had not taken actual possession of the buffaloes nor seized them, the accused had committed no offence in removing them. He, therefore, referred the case to the High Court:—

Held, that the offence of theft was constituted by the removal of buffaloes, inasmuch as on the proved facts the Mamlatdar was in possession of them.

THIS was a reference made by B. C. Kennedy, Sessions Judge of Ahmedabad.

Accused Nos. 2 and 3, who lived at the village of Khandli in the Kaira District, made a default in the payment of land revenue. The Mamlatdar, accompanied by the Mahalkari, the Avalkarkun and other Karkuns, went to their houses to distrain their moveable property under the provisions of section 154 of the Bombay Land Revenue Code. The party found two buffaloes in front of the accuseds' houses for which they made a *panchnama* and declared that the buffaloes

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* Criminal Reference No. 39 of 1918.

† The Section runs thus :—

154. The Collector may also cause the defaulter's moveable property to be distrained and sold.

were attached. No one seized the buffaloes or even touched them. When the accused tried to untie the buffaloes on the pretext of watering them, they were warned by the Mamlatdar not to touch the buffaloes which, he said, were already attached. Subsequently, accused Nos. 2 and 3, on the instigation of accused No. 1 removed the buffaloes.

The accused were thereupon tried for the offence of theft. The trying Magistrate convicted the accused Nos. 2 and 3 of the offence of theft and sentenced them to suffer simple imprisonment for six weeks; he convicted accused No. 1 of abetment of theft and sentenced him to suffer simple imprisonment for three weeks.

Accused Nos. 2 and 3 appealed to the Sessions Judge at Ahmedabad; and the learned Judge acquitted both accused on the ground that as the Mamlatdar had not taken actual possession of the buffaloes, nor even touched them in making the attachment, the accused had committed no offence in removing the buffaloes. The sentence passed upon accused No. 1 being a non-appealable one, his case was referred to the High Court, for setting aside the conviction and sentence passed upon him.

The reference was heard.

R. J. Thakor (for *G. N. Thakor*), for the accused :— The buffaloes were never taken by the Mamlatdar into actual possession ; they remained, as they ever had been, in the possession of the accused. The attachment of moveable property can only be by its actual seizure : see Civil Procedure Code, 1908, Order XXI, Rule 43.

S. S. Patkar, Government Pleader, for the Crown :— Seizure may be actual or constructive : see Halsbury's Laws of England, Vol. XI, p. 165. In *Cramer* v. *Mott*[1], it was held that a landlord could distrain by

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asking the tenant not to remove the goods. Here, there is evidence to show that the Mamlatdar had taken actual possession of the buffaloes.

PRATT, J.:—This is a reference from the Sessions Judge of Ahmedabad in the case of accused No. 1 Lallu Waghji who was convicted of the offence of theft by the First Class Magistrate of Nadiad. Lallu Waghji was the 1st accused in the case before the Magistrate and he and two others were convicted of theft. The two others, accused Nos. 2 and 3, appealed to the Sessions Judge and the Sessions Judge reversed the convictions of accused Nos. 2 and 3 under section 379. The case of accused No. 1, Lallu Waghji, is referred to this Court, as no appeal lay in his case, the sentence being one of simple imprisonment for three weeks only.

The facts out of which the convictions arose are as follows:—Accused Nos. 2 and 3 had made a default in the payment of land revenue and the Mamlatdar proceeded to their houses to make a distraint of moveables under section 154 of the Bombay Land Revenue Code. He found two she-buffaloes belonging to these accused which were being milked by a woman of the defaulters' household. He told her he intended to attach the buffaloes and the woman said that he might do so after she had finished milking them. The Mamlatdar allowed her to finish and then made a *panchnama* declaring the buffaloes to be under attachment. Accused Nos. 2 and 3 tried to remove the buffaloes on the pretext of watering them, but were prevented from doing so by the Mamlatdar. Subsequently at the instigation of accused No. 1, Lallu Waghji, who is a leading villager, accused Nos. 2 and 3 untied and removed the buffaloes. The Sessions Judge is of opinion that the removal of the buffaloes did not amount to theft, because the buffaloes were not at the time in the possession of the Mamlatdar. He says in

his judgment that it is necessary for the person effecting the attachment actually to lay hands on the animals or some fastening thereof, and that until that is done, there is no attachment any more than there is arrest without imposition of hands.

We think this statement of law is incorrect. The English common law rule is that, except in case of submission, arrest of person consists of the actual seizure or touching of the body of a person with a view to his detention. This rule would no doubt be followed in India although there is no express authority on the subject but it has no application to distraint of chattels. The attachment was not under the Code of Civil Procedure and therefore the provisions of Order XXI, Rule 43, which require actual seizure, do not apply. The common law rule as to seizure for distraint of chattels is that the seizure may be either actual or constructive. This is illustrated by the case of *Cramer* v. *Mott*[1] where the refusal of a landlord to allow the owner of a piano let on hire to his tenant to remove the piano until his rent was paid was held to be a sufficient seizure although the landlord had never touched the piano.

The point which the Sessions Judge had to consider was whether the buffaloes were in possession of the Mamlatdar. Now physical contact is not necessary to complete physical possession, and possession depends upon the physical possibility of the possessor dealing with the thing exclusively. The facts here found are that the Mamlatdar had a statutory right to take possession, he came to the place where the buffaloes were with the intention of taking possession, he made a declaration and the *panchnamà* that he had taken possession and he exercised the right of possession by

[1] (1870) L. R. 5 Q. B. 357.

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forbidding the defaulters from removing them. On these facts we think the Mamlatdar was in possession and that the offence of theft was constituted by the removal of the buffaloes.

We therefore see no reason to interfere with the conviction and sentence passed by the Magistrate, First Class, of Nadiad, and direct that the record and proceedings be returned.

HEATON, J.:—I concur.

Conviction and sentence confirmed.

R. R.

CRIMINAL REVISION.

Before Mr. Justice Heaton and Mr. Justice Pratt.

EMPEROR v. SAYED YACOOB SAYED LALLAMIAN.*

1918. *November* 13.

Criminal Procedure Code (Act V of 1898), section 106—"Offences involving breach of the peace"—Offence punishable under section 504 of the Indian Penal Code (Act XLV of 1860) is such an offence—Security for keeping the peace on conviction.

On a conviction for an offence punishable under section 504 of the Indian Penal Code, the accused was ordered to furnish security to keep the peace for a period of one year under section 106 of the Criminal Procedure Code. The accused having applied to the High Court to have the order set aside:—

Held, that the order was properly made, for the expression "other offences involving a breach of the peace" in section 106 of the Criminal Procedure Code included offences which were offences because a breach of the peace had occurred or because a breach of the peace was likely to occur.

THIS was an application to revise an order passed by Chunilal H. Setalvad, Second Presidency Magistrate of Bombay.

* Criminal Application for Revision No. 283 of 1918.